

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ARTURO BARRIENTOS,

Petitioner,

v.

ICE FIELD OFFICE DIRECTOR,

Respondent.

NO. C15-982-RSL-JPD

REPORT AND
RECOMMENDATION

INTRODUCTION

Petitioner Arturo Barrientos, a detainee at the Northwest Detention Center in Tacoma, Washington, has filed a *pro se* habeas corpus petition under 28 U.S.C. § 2241, challenging his detention without bond by U.S. Immigration and Customs Enforcement (“ICE”) and seeking release on supervision or a bond hearing. *See* Dkt. 7. Respondent has moved to dismiss, arguing that petitioner is not entitled to release and has already had a bond hearing where the Immigration Judge (“IJ”) found that the government met its burden of proving he is a danger to the community and a flight risk. *See* Dkt. 10. Petitioner filed a response and a motion to appoint counsel, which respondent opposes. Dkts. 13, 14, 16. Having considered the parties’ submissions, the balance of the record, and the governing law, the Court concludes that respondent’s motion to dismiss should be GRANTED, petitioner’s habeas petition should be

1 DENIED, and this action should be DISMISSED with prejudice. In addition, the Court
2 DENIES petitioner's motion to appoint counsel.

3 BACKGROUND

4 Petitioner, a native and citizen of El Salvador, entered the United States in March 2007
5 at an unknown location and without inspection. Dkt. 11-2 at 3. On May 13, 2014, an IJ denied
6 petitioner's petitions for asylum, withholding of removal, and relief under the Convention
7 Against Torture, and granted petitioner's request for voluntary departure. *See id.* at 3-21. The
8 Board of Immigration Appeals dismissed petitioner's appeal and notified petitioner that if he
9 filed a petition for review with the Ninth Circuit, the grant of voluntary departure would be
10 automatically terminated and the alternate order of removal would immediately take effect. *Id.*
11 at 27-45.

12 Petitioner appealed to the Ninth Circuit, which stayed his removal pending review.
13 *Barrientos v. Lynch*, No. 14-73178, Dkt. 7 (9th Cir. Jan. 14, 2015). To date, petitioner's
14 petition for review remains pending and the stay of removal is in effect.

15 On March 24, 2015, petitioner had a bond hearing before an IJ pursuant to *Casas-*
16 *Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008). Dkt. 11-3 at 2-
17 25. The IJ found that the government sustained its burden of showing by clear and convincing
18 evidence that petitioner was a danger to the community and a flight risk. Dkt. 11-3 at 17.
19 Accordingly, the IJ denied bond. *Id.* at 17, 20.

20 DISCUSSION

21 A. Merits of petitioner's habeas petition

22 Petitioner brings this action pursuant to 28 U.S.C. § 2241, which authorizes the district
23 court to grant a writ a habeas corpus whenever an individual is "in custody in violation of the
24 Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). The district

1 court's habeas jurisdiction includes review of "*Casas* bond hearing determinations for
2 constitutional claims and legal error." *Singh v. Holder*, 638 F.3d 1196, 1200 (9th Cir. 2011).

3 Because the Ninth Circuit has stayed petitioner's removal proceedings pending its
4 review of the administrative removal order, the statutory authority for petitioner's detention is
5 8 U.S.C. § 1226(a).¹ See *Casas-Castrillon*, 535 F.3d at 948; *Prieto-Romero v. Clark*, 534 F.3d
6 1053, 1059, 1062 (9th Cir. 2011) ("Because Prieto-Romero filed a petition for review and our
7 court entered a stay, his detention is governed by § 1226(a) . . ."). Section 1226(a) provides
8 the Attorney General with discretionary authority to detain petitioner or release him on bond or
9 conditional parole pending the completion of removal proceedings. 8 U.S.C. § 1226(a). In
10 making a bond decision under § 1226(a), an IJ "must consider whether an alien who seeks a
11 change in custody status is a threat to national security, a danger to the community at large,
12 likely to abscond, or otherwise a poor bail risk." *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA
13 2006) (citing *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976)). An IJ may also consider any
14 number of discretionary factors, including:

15 (1) whether the alien has a fixed address in the United States; (2) the alien's
16 length of residence in the United States; (3) the alien's family ties in the United
17 States, and whether they may entitle the alien to reside permanently in the
18 United States in the future; (4) the alien's employment history; (5) the alien's
19 record of appearance in court; (6) the alien's criminal record, including the
20 extensiveness of criminal activity, the recency of such activity, and the
21 seriousness of the offenses; (7) the alien's history of immigration violations; (8)
22 any attempts by the alien to flee persecution or otherwise escape authorities, and
23 (9) the alien's manner of entry to the United States.

24 *Id.*

¹ If the Ninth Circuit rejects petitioner's petition for review, the statutory basis for
petitioner's detention will shift to 8 U.S.C. § 1231. See *Casas-Castrillon*, 535 F.3d at 947;
Prieto-Romero, 534 F.3d at 1062 ("[O]nly if we enter a final order denying [Prieto-Romero's]
petition for review will the statutory source of the Attorney General's detention authority shift
from § 1226(a) to § 1231(a).").

1 Aliens, like petitioner, who face prolonged detention while their petitions for review are
2 pending before the Ninth Circuit are entitled to a *Casas* bond hearing to establish whether their
3 release would present a danger to the community or a flight risk. *Casas-Castrillon*, 535 F.3d at
4 951; *Prieto-Romero*, 534 F.3d at 1065-66; *Singh*, 638 F.3d at 1203; *see also Diouf v. Mukasey*,
5 634 F.3d 1081, 1085-86 (9th Cir. 2011). The Ninth Circuit has established the following
6 procedural requirements for *Casas* hearings: (1) the government must provide
7 contemporaneous records of the hearing; (2) the IJ must place the burden of proof on the
8 government; (3) the government must prove by clear and convincing evidence that the
9 continued detention is justified; and (4) the alien's criminal history alone may be insufficient to
10 meet the dangerousness standard that must be met to deny bond and justify detention, but the
11 government need not establish "special dangerousness" to justify denial of a bond. *Singh*, 638
12 F.3d at 1203-09.

13 Here, the record establishes that petitioner's *Casas* hearing was legally sufficient, and
14 therefore his continued detention—although lengthy—does not violate statutory or
15 constitutional law. First, the audio recording of petitioner's March 2015 *Casas* hearing
16 establishes that the IJ properly placed the burden on the government to establish by clear and
17 convincing evidence that petitioner was a danger to the community or a flight risk. Dkt. 11-3
18 at 7 ("I do find it's the Department's burden to show by clear and convincing evidence the
19 Respondent is a flight risk or a danger. And these proceedings are being recorded.").

20 Second, the evidence presented during the hearing was sufficient to satisfy the clear and
21 convincing evidence standard. The government presented evidence that petitioner has a
22 criminal history, which included a citation for disorderly conduct in 2009, a conviction for
23 failing to carry a license in 2012, and an arrest in 2013 for an incident that involved driving
24 under the influence of alcohol, a hit and run, and sexual abuse of a 17 year old female. *Id.* at 8-

9; *see also* Dkt. 11-1 at 2, 13. Although petitioner had not been convicted of the 2013 incident, he admitted that he fled the scene of the car accident and that the female involved was a minor. Dkt. 11-3 at 11. The government also argued that petitioner was a flight risk because although he has a child who is a United States citizen, he is subject to a final order of removal and fled the scene of an accident. *Id.* at 10. The IJ ultimately found that “the Department met its burden by clear and convincing evidence” to show that petitioner is a danger and a flight risk. *Id.* at 17.

Petitioner argues the IJ’s finding is erroneous because the 2013 charges against him have been dismissed. Dkt. 13. The order petitioner submits as proof relates to a civil matter in which petitioner is the plaintiff, not the 2013 criminal matter. *See* Dkt. 13 at 3. Moreover, even if the 2013 charges have been dismissed, petitioner fails to establish that his *Casas* bond hearing was constitutionally deficient. Indeed, the IJ also found that petitioner’s continued detention was justified because he admittedly fled the scene of an accident and therefore was a flight risk. The Court finds no constitutional claim or legal error.

In sum, although bond was denied, petitioner’s procedural due process rights were satisfied because he received the individualized hearing required by § 1226(a), and the government satisfied its burden of proving by clear and convincing evidence that petitioner was a danger to the community and a flight risk. Accordingly, petitioner’s habeas petition should be denied.

B. Petitioner’s motion to appoint counsel

Petitioner asks the Court to appoint counsel to represent him in this matter. Dkt. 14. There is no right to have counsel appointed in § 2241 cases unless an evidentiary hearing is required. *See Terravona v. Kincheloe*, 852 F.2d 424, 429 (9th Cir. 1988); *Brown v. Vasquez*, 952 F.2d 1164, 1168 (9th Cir. 1992). Where an evidentiary hearing is not required, the Court

1 may appoint counsel for a financially eligible petitioner where the “interests of justice so
2 require.” 18 U.S.C. § 3006A.

3 Petitioner argues that appointment of counsel in this case is appropriate because his
4 detention is indefinite within the meaning of *Zadvydas v. Davis*, 533 U.S. 678 (2001), he is
5 unable to present his case given the complexity of the issues, and there is a high likelihood that
6 he will succeed on the merits. Dkt. 14. Petitioner is incorrect on all accounts. Because the
7 Ninth Circuit has not yet ruled on petitioner’s petition for review, his removal order is not
8 final, and *Zadvydas* is inapplicable. Moreover, there is no likelihood that he will succeed on
9 the merits, as discussed above, and the issues in this case are not particularly complex. Thus,
10 the interests of justice do not require the appointment of counsel. Finally, an evidentiary
11 hearing is not required, and therefore, petitioner has no right to have counsel appointed. For
12 these reasons, the Court denies petitioner’s motion to appoint counsel.

13 CONCLUSION

14 For the foregoing reasons, the Court recommends that respondent’s motion to dismiss,
15 Dkt. 10, be GRANTED; petitioner’s habeas petition, Dkt. 7, be DENIED; and this case be
16 DISMISSED with prejudice. In addition, the Court DENIES petitioner’s motion to appoint
17 counsel, Dkt. 14. A proposed order accompanies this Report and Recommendation.

18 Objections to this Report and Recommendation, if any, should be filed with the Clerk
19 and served upon all parties to this suit by no later than **October 19, 2015**. Failure to file
20 objections within the specified time may affect your right to appeal. Objections should be
21 noted for consideration on the District Judge's motion calendar for the third Friday after they
22 are filed. Responses to objections may be filed within **fourteen (14)** days after service of
23 objections. If no timely objections are filed, the matter will be ready for consideration by the
24 District Judge on **October 23, 2015**.

1 This Report and Recommendation is not an appealable order. Thus, a notice of appeal
2 seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the
3 assigned District Judge acts on this Report and Recommendation.

4 DATED this 28th day of September, 2015.

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JAMES P. DONOHUE
7 Chief United States Magistrate Judge
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